

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-67

October 7, 2011

Mr. Joseph A. Davis, II

Re: Freedom of Information Act Appeal 2011-67

Dear Mr. Davis:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated September 5, 2011 (the “Appeal”). You (“Appellant”) assert that the Office of the State Superintendent of Education (“OSSE”) improperly withheld records in response to your request for information under DC FOIA dated July 5, 2011 (the “FOIA Request”).

Background

Appellant’s FOIA Request sought emails from Ms. Sheryl Hamilton regarding Youth Engaged for Success, Inc. for the period October 1, 2010 to July 5, 2011.

In response, by email dated July 19, 2011, OSSE stated that there were no documents found which were responsive to this request.

On Appeal, Appellant challenges the response to the FOIA Request. Appellant attached two emails which are identified as meeting the criteria of the FOIA Request.

In its response, by email dated October 6, 2011, OSSE reaffirmed its position. In support of its position, it attached an email trail from the Office of the Chief Technology Officer (“OCTO”), the agency which processes email searches under DC FOIA, stating that no responsive records were located.

Discussion

It is the public policy of the District of Columbia (the “District”) government that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, the DC FOIA creates the right “to inspect ... and ... copy any public

record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Appellant presents a challenge to the adequacy of the search and response of OSSE. DC FOIA requires only that, under the circumstances, a search is reasonably calculated to produce the relevant documents. The test is not whether any additional documents might conceivably exist, but whether the government's search for responsive documents was adequate. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Speculation, unsupported by any factual evidence, that records exist is not enough to support a finding that full disclosure has not been made. *Marks v. United States (Dep't of Justice)*, 578 F.2d 261 (9th Cir. 1978).

In this case, OSSE received the FOIA Request and, in accordance with established procedure, OCTO conducted a search on its behalf for the requested records and found no responsive records. As indicated, the test is not whether there are additional documents which may exist, but whether there was a reasonable and adequate search. Here, OSSE and OCTO made a good faith search reasonably calculated to produce the relevant records.

Normally, that would be the end of the matter. However, we have examined the email trail from OCTO, which emails describes the search, including the search terms and parameters. Appellant has a distinctive name. As the second in a line of Joseph Davises, he has chosen to append “II” after his name. In addition, he has chosen to add the letters “ii” after “jdavis” in the identifying name in his email address. When OCTO performed its search pursuant to the FOIA Request, it searched for emails to or from jdavis@youthengaged.org rather than jdavisii@youthengaged.org. This appears to be the reason why there were no responsive records located.

Accordingly, we are ordering a new search. We note that the previous search was conducted by placing the email address of Appellant in the to, from, and cc fields. One question that we are not able to answer is whether this is necessary to conduct the search. In addition, we do not know if individuals from Youth Engaged for Success, Inc. other than Appellant would have emailed Ms. Hamilton. If it is not necessary to know participants to the email other than Ms. Hamilton to conduct the search, this should not be used as a limiting parameter. If it is necessary to know these individuals in order to conduct the search, OSSE shall contact Appellant to determine which email addresses from Youth Engaged for Success, Inc. should be searched.

Conclusion

Therefore, we remand this matter to OSSE to conduct a new search in accordance with this decision.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Tracey Langley